IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE ***PETITIONER***

v. **NO. 2015-JP-00996-SCT**

JUDGE DAVID SHOEMAKE ***RESPONDENT***

BRIEF ON BEHALF OF THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

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BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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The Mississippi Commission on Judicial Performance ("Commission") herewith files this brief with the Supreme Court of Mississippi, in accordance with Rule 10D of the Rules of the Mississippi Commission on Judicial Performance. This brief is submitted on behalf of the Mississippi Commission on Judicial Performance relating to the conduct of David Shoemake, Chancellor for the Thirteenth Chancery District, State of Mississippi, hereinafter referred to as ("Respondent").

STATEMENT OF THE ISSUES

I. The Commission did not err in rejecting Respondent's arguments regarding Rule 5C of the Rules of the Mississippi Commission on Judicial Performance.

II. The Commission did not err in rejecting Respondent's arguments regarding Rule 4 of the Rules of the Mississippi Commission on Judicial Performance.

III. The Commission did not err in rejecting Respondent's arguments regarding the amendment of the Formal Complaint.

IV. The Commission did not err in rejecting Respondent's arguments regarding alleged discovery violations.

V. The conduct of Respondent constituted willful misconduct in office and conduct

prejudicial to the administration of justice which brings the judicial office into disrepute pursuant to Section 177A of the Mississippi Constitution of 1890, as amended.

VI. Respondent should be removed from office by the Supreme Court of Mississippi and fined $2,500 pursuant to Section 177A of the Mississippi Constitution of 1890, as amended, and assessed the costs of the proceedings in the sum of $5,882.67.

STATEMENT OF THE CASE

The "Commission Findings of Fact and Recommendation," which was filed with this Court on June 30, 2015, accurately states the procedural history of this matter:

> On October 11, 2013 at its regularly scheduled meeting, the Commission found probable cause to file a Formal Complaint against Respondent in Inquiry Concerning a Judge No. 2013-083. Upon further motion, in accordance with Rule 7 of the Rules of the Mississippi Commission on Judicial Performance, the Commission voted unanimously to order, and ordered, Respondent to show good cause why the Commission should not recommend that Respondent be suspended from office while that Inquiry was pending.
>
> On October 17, 2013, the Commission filed a Formal Complaint charging Respondent with judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code of Judicial Conduct of Mississippi Judges ("the Code") and that Respondent's conduct violated Section 177A of the Mississippi Constitution of 1890.
>
> On November 1, 2013, a Show Cause hearing was held in this matter before a duly constituted Committee ("the Committee") of the Commission. FN1
>
> > FN. 1. The Committee as constituted at the time of the Show Cause Hearing consisted of Commission members Hon. Robin Midcalf, Hon. Jimmy Morton, and Roy Campbell, Esq.
>
> On or about November 18, 2013, Respondent filed his Answer to Formal Complaint.
>
> On November 19, 2013, the Committee recommended against an interim suspension and, on December 13, 2013, at its regularly scheduled meeting, the Commission adopted that recommendation and voted to not recommend an interim suspension during the pendency of the Formal Complaint.

On July 11, 2014, after being granted leave to do so by the Committee, the Commission filed its Amended Formal Complaint. The Amended Formal Complaint charged Respondent with three counts of judicial misconduct: Count One charged judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code; Count Two charged judicial misconduct violating Canons 1, 2A, and 3B(2) of the Code; Count Three charged misconduct which violated Section 177A of the Mississippi Constitution, constituting willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

On July 31, 2014, Respondent filed his Answer to Amended Formal Complaint.

On October 22, 2014, after again being granted leave to do so by the Committee, the Commission filed its Second Amended Formal Complaint. The Second Amended Formal Complaint charged Respondent with three counts of judicial misconduct: Count One charged judicial misconduct violating Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code; Count Two charged judicial misconduct violating Canons 1, 2A, and 3B(2) of the Code; Count Three charged misconduct which violated Section 177A of the Mississippi Constitution, constituting willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

On December 3, 2014, Respondent submitted for filing by facsimile his out-of-time Answer, Defenses and Affirmative Matters. On March 12, 2015, the Committee denied the Commission counsel's motion to strike that answer, but with the caveat that the Committee was not agreeing that extraneous information and allegations in that answer were relevant. (T. 30-31). FN2

FN2. Citations to the transcript from the Formal Hearing on March 12, 2015 are designated herein as "(T. __)." Citations to exhibits admitted during the Formal Hearing are designated herein as "(Ex. _ at _)."

As stated above, on March 12, 2015, in Jackson, Mississippi, the Formal Hearing commenced before the Committee and evidence, both testimony and documents, was received; that hearing was recessed at the end of the day for receipt of supplemental evidence. FN3

FN3. The Committee as constituted at the time of the Formal Hearing consisted only of Commission members Hon. Jimmy Morton and Roy Campbell, Esq. Hon. Robin Midcalf's appointment to the Commission expired prior to the commencement of the Formal Hearing.

Subsequently, the parties executed a Stipulation dated March 23, 2015, with attached exhibits, that stipulation was submitted to and marked by the court reporter as an exhibit and, effective with the date noted on that stipulation by the court reporter, April 10, 2015, the hearing was concluded.

By Order dated April 17, 2015, the Commission granted the Committee additional time, through and including May 11, 2015, within which to submit its findings and recommendation. Those findings were filed on May 11, 2015.

On May 11, 2015, the Committee also entered an Order supplementing the record with a seventeen-page fax dated July 21, 2011.

On June 1, 2015, Respondent filed his Motion to Supplement Clerks Papers.

By agreement of the parties and the Committee, on June 2, 2015, Respondent and Commission counsel filed their objections to the Findings and Recommendation of the Committee.

In addition, on June 2, 2015, Respondent filed a Motion to Appear before the Full Commission on Judicial Performance or, in the Alternative, to Exclude Participation of Committee Members from Review of the Findings and Recommendations of the Committee. Commission counsel responded to said Motion on June 3, 2015. Respondent responded to the Commission's reply on June 8, 2015.

On June 10, 2015 Respondent filed a Motion to Seal the Record and Maintain Confidentiality of all Proceedings before the Commission on Judicial Performance Following Review of the Findings and Recommendations of the Committee. Commission counsel responded that same day to Respondent's Motion to Seal the Record and Maintain Confidentiality of All Proceedings before the Commission on Judicial Performance Following Review of the Findings and Recommendations of the Committee as well as Respondent's June 1, 2015 Motion to Supplement Clerks Papers.

On June 11, 2015, the full Commission convened and considered the pleadings wherein arguments were made in support of and in opposition to Respondent's Motion to Appear before the Full Commission on Judicial Performance or, in the Alternative, to Exclude Participation of Committee Members from Review of the Findings and Recommendations of the Committee; Motion to Seal the Record and Maintain Confidentiality of all Proceedings Before the Commission on Judicial Performance[.] Following Review of the Findings and Recommendations of the Committee; and Motion to Supplement Clerks Papers together with Commission counsel's responses. Respondent's motions were denied and orders were entered to

that effect on June 12, 2015 by the Chairman of the Commission, Judge Lee J. Howard.

> On June 12, 2015, the full Commission convened and considered the Findings and Recommendation of the Committee, as well as the objections filed by Respondent and Commission counsel. By clear and convincing evidence, the Commission approved and adopted the following findings and recommendations: ...

(Commission Findings of Fact and Recommendation p. 2-6). On June 30, 2015 the "Commission Findings of Fact and Recommendation" were filed with the Clerk of this Court along with the Clerk's Papers, Exhibits, and the Transcript from the Show Cause Hearing held on November 1, 2013, the Transcript of hearings regarding several motions held on July 11, 2014, and the Transcript of the Formal Hearing held on March 12, 2015.[1]

STATEMENT OF THE FACTS

Based upon the evidence received during the Formal Hearing of this matter, together with the supplementation, following review and study of the Findings and Recommendation of the Committee, together with the June 2, 2015 objections filed by Respondent and counsel for the Commission, and with due consideration of the factors delineated in ***Miss. Comm'n on Judicial Performance v. Gibson***, 883 So. 2d 1155, 1158 (Miss. 2004) as modified by ***Miss. Comm'n on Judicial Performance v. Skinner***, 119 So. 3d 294 (Miss. 2013), the Commission found the

[1]Citations to the Clerk's Papers will be designated as (CP _). Citations to the Transcript from the March 12, 2015 Formal Hearing will be designated as (T _). Citations to the Exhibits from the Formal Hearing will be designated as (Ex _). The transcript from the November 1, 2013 Show Cause Hearing was admitted as Exhibit 4 during the Formal Hearing and will be designated as (Ex 4 p. _.) Exhibit 1 from the Show Cause Hearing is the certified chancery court file and it was admitted as Exhibit 5 during the Formal Hearing and will be designated as (Ex 5 p. _.) The remaining exhibits from the Show Cause Hearing were admitted as Exhibit 6 during the Formal Hearing and will be designated as (Ex 6 p. _.) Citations to the Transcript from the July 11, 2014 motions hearing will be designated as (07/11/2014 T _).

following by clear and convincing evidence:

Respondent is now and was at all relevant times the duly elected Chancellor for the 13th Chancery Court District, State of Mississippi.

On or about July 14, 2010, Respondent's former fellow Chancellor, Joe Dale Walker ("Walker"),[2] signed a decree appointing Marilyn Denise Newsome as conservator of her daughter, Victoria Denise Newsome in *In the Matter of the Conservatorship of Victoria Denise Newsome*, Cause No. 2010-0146, in the Chancery Court of Simpson County, Mississippi. (Ex 5 p. 19-20). Victoria Denise Newsome later received a settlement in a medical negligence claim, being represented in that case by the law firm of Merkel & Cocke. (Ex 5 p. 42-49).

Walker ordered that a house be constructed for the use and benefit of the ward, Victoria Denise Newsome, and that a minimum of four bids should be obtained by the attorney for the conservatorship, Keely R. McNulty, Esq. ("McNulty") (Ex 5 p. 61). The lowest bid submitted was from C.T. Construction, a company owned by Walker's nephew, Chad Teater. (Ex 5 p. 185, 199). Walker, on July 22, 2011, entered an Order Transferring Cause for Limited Purpose wherein he transferred the case to Respondent for the limited purpose of approving and accepting bids for the construction of the home for the ward. (Ex 5 p. 93). The July 22, 2011 order also directed that the case be transferred back to Walker after the awarding of the bid. (Ex 5 p. 93).

The day before that order was entered, on July 21, 2011, McNulty sent Respondent a seventeen-page document by facsimile. (Ex 24 p. 4). The document included a petition, a proposed order, and five bids. (Ex 24 p. 2-17). The bid from C.T. Construction was in the amount of

[2]The Commission's recommendation that Judge Walker be removed from office is currently pending before this Court. *See* ***Miss. Comm'n on Judicial Performance v. Walker***, 2014-JP-00005-SCT.

$296,575.14. (Ex 24 p. 4).

On July 22, 2011, Respondent signed an order authorizing the conservator to accept the lowest bid of C.T. Construction for construction of a home in the sum of $273,075.14 and transferred the case back to Walker. (Ex 5 p. 99-100). The order was entered by the Chancery Clerk on August 2, 2011. *Id*. Although that order recites that copies of the five bids received were attached to the order as exhibits, no bids are attached to that order on file in the clerk's office. *Id*. At the time that order was filed no petition requesting that relief was on file, and the Conservator neither gave McNulty permission nor had knowledge of that request for relief. (Ex 7; T 115). Nine months later, on April 24, 2012, McNulty filed two Petitions for Approval of Contractor, both of which requested approval of the C.T. Construction bid of $273,075.14 and both of which had five bids attached. (Ex 5 p. 185-98, 199-215). Both copies of the C.T. Construction bid were for $296,575.14. Neither petition was sworn to and neither was signed by the Conservator.

Thereafter, on July 28, 2011, after Respondent had transferred the matter back to Walker, Respondent signed an order, again submitted by McNulty, authorizing and ordering the approval of C.T. Construction's "attached" Construction Management Agreement, including a $30,000.00 fee, and approval of contractors' and subcontractors' invoices in accordance with an "attached" itemized proposal, and also authorizing the Conservator to sign that Construction Management Agreement. (Ex 5 p. 101-02). Nothing is attached to that order as filed with the clerk's office.[3] *Id*. No petition requesting that relief was ever filed, and the Conservator neither gave her permission nor had

[3]Two copies of a Construction Management Agreement, marked as "Exhibit B," but unattached to a petition or order, are found in the certified copy of the chancery court file. (Ex 5 p. 119, 120). The certified copy of the general docket of the chancery court also lists the Construction Management Agreement as having been filed on December 28, 2011. (Ex 7).

knowledge of McNulty's request for relief. (Ex 7; T. 115-17).

On August 2, 2011, after he had transferred the case back to Walker, Respondent signed an order authorizing and ordering the law firm of Merkel & Cocke to transfer the sum of $258,395.14 from their escrow account to the conservatorship account for the construction of the home. (Ex 5 p. 103-104). The order was entered on August 9, 2011. No petition requesting that relief was ever filed, and the Conservator neither gave her permission nor had knowledge of that request for relief. (Ex 7; T 117-18).

On January 24, 2012, McNulty filed a petition purportedly on behalf of the conservator, requesting that $23,000.00 be paid to C.T. Construction for reimbursement for materials allegedly stolen from the construction site. (Ex 5 p. 127-131). The conservator, Marilyn Denise Newsome, neither signed that petition nor was she given notice that a petition had been filed by McNulty. (T 118-119). Respondent, on January 25, 2012, in spite of having transferred the case back to Walker, signed an order directing payment of $23,000.00 to C.T. Construction for the allegedly stolen materials. (Ex 5 p. 132-133). The order was entered by the Chancery Clerk on February 2, 2012. (Ex 5 p. 132-133; Ex 7). There was no hearing held and no evidence presented that the materials were stolen due to any fault attributable to the conservator or ward, or that C.T. Construction was entitled to be reimbursed from the assets of the ward. (Ex 5 p. 132-133; T. 119-120; 335). An affidavit attached to the petition, signed by Chad Teater, attributes no fault to the conservator or the ward, gives no basis for charging the alleged loss to them, and in fact indicates that the materials might have never been delivered to the job site. (Ex 5 p. 129).

On March 14, 2012, Terrell Stubbs, Esq., filed his Entry of Appearance of Counsel, wherein he appeared as counsel for Marilyn Newsome individually and in her capacity as Conservator of her

daughter Victoria Newsome. (Ex 5 p. 145-146; Ex 7). On March 20, 2012, McNulty filed her first Motion to Withdraw as Counsel for the Conservatorship of Victoria Denise Newsome. (Ex 5 p. 150-152).

In spite of having transferred the case back to Walker, Respondent signed an order on March 26, 2012, noted to be *nunc pro tunc* to August 2, 2011. (Ex 5 p. 219-220). Handwritten notations on the order indicate that the order was "filed" by Walker on March 26, 2012 and received by the Chancery Clerk's office on April 24, 2012. (Ex 5 p. 219-220; Ex 7). This order references a "Petition for Approval of Correction of Construction Fund Amount and to Authorize Transfer and Withdrawal of Funds," however, no such petition had been filed with the chancery clerk prior to the signing of this order. (Ex 5; Ex 7). This order "finds and adjudicates," in pertinent part, that the original bid of $273,075.14 was wrong due to a typographical error and that the actual bid was $296,575.15. (Ex 5 p. 219-220). In this order, Respondent ordered the transfer of $23,500.00 to the conservatorship account. *Id*. All of this was done with no petition filed by the conservator and no notice to the conservator or her new counsel. (T. 121; 124-125).[4]

Respondent met with Commission staff on August 23, 2013, to discuss actions taken in the Newsome Conservatorship and to discuss another unrelated matter.[5] Respondent testified that

[4]A "Petition for Approval of Correction of Construction Fund Amount and to Authorize Transfer and Withdrawal of Funds" is listed on the certified copy of the general docket of the chancery court as having been filed on April 24, 2012. (Ex 7). A copy of the petition, bearing a "filed" stamp of April 24, 2012, is found in the certified copy of the chancery court file. (Ex 5 p. 183-184).

[5]Respondent has stated in various pleadings that during this meeting, those in attendance only discussed the Newsome conservatorship case and that he was told that there was no complaint pending against him at the Commission. Judge John Toney, former Executive Director, and Darlene Ballard, then Senior Staff Attorney, met with Respondent at the Commission office and discussed the Newsome Conservatorship and another pending matter.

following this meeting he searched his office, reviewed the chancery court file for the conservatorship, and generally familiarized himself with the proceedings. (T. 182; Ex 4 p. 10; 23-24; 49).

Based on the above facts, the Commission requested that Respondent attend a show cause hearing affording Respondent the opportunity to defend the actions taken in the Victoria Newsome Conservatorship. (Ex 4).

A show cause hearing was held in this matter on November 1, 2013. (Ex 4). Respondent was called to testify under oath at that hearing and was asked specific questions regarding whether or not Respondent's signatures were on the orders in controversy in the Newsome Conservatorship. As discussed in detail below, under oath Respondent adamantly and repeatedly denied signing those orders, with the exception of the order signed on July 22, 2011, at Walker's request. (Ex 5 p. 99-100; Ex 4 p. 49, 52). Respondent was equally adamant that he never signs an order without an accompanying petition. (Ex 4 p. 45; T 210; 218). Respondent testified at the November 1, 2013, Show Cause hearing that he had become familiar with the Newsome Conservatorship after meeting with Judge Toney, the Executive Director of the Commission at the time, on August 23, 2013. (T. 182; Ex 4 p. 10; 23-24; 49).

The order dated July 28, 2011 makes no reference to an accompanying petition, and none is on file. (Ex 5 p. 101-102; Ex 7). Yet Respondent insisted that he never signs an order without a petition. (Ex 4 p. 45; T 218). And with respect to that order, Respondent distanced himself from any involvement with it with the explanation that it contained paragraphs that he had previously rejected.

Although there is no recording or transcript from the meeting, counsel for the Commission deny that anyone told Respondent that there was no complaint pending against him.

(Ex 4 p. 50; T224-225). In short, Respondent denied signing that order; that changed following a handwriting analysis.

Concerning the order dated August 2, 2011,[6] Respondent testified at the Show Cause hearing: "I'll say no, it's not my signature. It looks like my signature. But I don't think it's my signature. I think it's been transposed or cut and pasted or something." (Ex 4 p. 30; T 196-197). As the questioning continued concerning that order, Respondent testified:

> Q: So you maintain that this is not your signature on the order filed on August 9th and dated August 2nd?
>
> A: Yes ma'am, that's what I maintain. And, if you will notice, the order that has the date August 2nd, 2011, has been cut and pasted. It's got three computer fonts on the front page. And it tries to cut in this language from the copy of the order that she sent me at 3:59 an [sic] August 2, 2011.
>
> So the order has obviously been messed with. Somebody has cut and pasted. . . .

(Ex 4 p. 37; T 204-205). Then, to remove any doubt that he had not signed that order, Respondent made this absolute, unconditional statement:

> I have never in my life signed a second page with a signature blank on it and that's all; as a lawyer doing deeds or accepting deeds or any kind of document. I would not have signed my name on a page with my signature blank alone, because it just throws into credibility the first page.
>
> You can change the two pages, make them interchangeable. And I had already refused these requests.

(Ex 4 p. 37; T 205; 209; 212). Respondent further testified, "And somehow or another an order got entered that David Shoemake did not participate in getting entered." (Ex 4 p. 40-41; T 214-215). Again, that changed following a handwriting analysis.

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[6](Ex 5 p. 103-104). The order was entered on the general docket on August 9, 2011. (Ex 7).

When Respondent was asked at that Show Cause hearing about his signature on the order dated January 25, 2012,[7] directing payment of $23,000 for the "stolen" materials, his response was again unconditional: "It is not my signature." (Ex 4 p. 44; T 217). When asked if he had conversations with McNulty concerning the petition for that order, he insisted that he had never had any conversations with her about those stolen materials. (Ex 4 p. 44; T 217). According to Respondent: "When this stuff was shown to me in August, I got physically sick, because I have never heard of this. I've never heard of this stuff." (Ex 4 p. 44; T 217-218). He went further in trying to distance himself from the order:

> I do not practice law or be a judge this way. I do not sign orders without petitions. And I don't sign them unless the petitions are done right. And I've reviewed this, and this is not stuff that I would have put my name on.
> . . . . I don't have a satisfactory explanation. I can't - I can't figure it out. And I can't name names or point fingers. But somehow or another somebody put my signature on an order without presenting that order to me.
>
> I don't do business that way. I just do not do business that way as a judge.

(Ex 4 p. 45; T 218). Respondent further disavowed any involvement with ordering the $23,000 payment without evidence: "I would have never -- if they had presented it to me, I wouldn't -- have not have [sic] signed it unless evidence had been presented. . . . I would have had to have some kind of police report or sheriff's report or something on materials. And then I would have to have something to show that the ward was responsible." (Ex 4 p. 45-46; T 219-220). Under questioning by his own counsel Respondent testified that the signature on that order does not even look like his signature, that "it's not my signature[,]" and that "I definitely would not do it [direct payment of the $23,000] if the fiduciary hadn't signed off on it . . . ." (Ex 4 p. 70-71; T 230-231). Respondent

[7] (Ex 5 p. 132-133). The order was entered on the general docket on February 2, 2012. (Ex 7).

further explained "the lady that works with me for 18 years says it's not my signature. Debbie Williams who worked for me for eight years before that 18 years, who is now my court reporter, says it's not my signature. I say its not my signature." (Ex 4, p. 70-71; T 230). As with the others, that changed following a handwriting analysis.

Respondent was next asked at the Show Cause hearing about signing the order dated March 26, 2012, the one that found a "typographical error" in the July 22, 2011, order and increased the amount of the accepted bid by $23,500, from $273,075.14 to $296,575.14. [8] Respondent's denials of signing that order, specifically his explanations for why he would never have signed such an order, are telling:

> Q: Judge, if you'll look on the second page and tell us whether or not that is your signature.
>
> A: No. ma'am, it is not my signature.
> . . . .
>
> A: . . . . But I did not sign this order. I would never have signed this order increasing a bid.
>
> I believe if somebody had come before me with evidence, I would not have signed that order. You just don't change a bid six months after letting the bid.
> . . . .
>
> A: . . . . Why would anybody present me with a petition and an order when I'm not the judge in the case?
>
> I'm post one. This is post two. . . .

(Ex 4 p. 46-49; T 221-222). Respondent even insisted that the petition seeking that "correction" was never presented to him. (Ex 4 p. 46; T 220). Again, all of that changed following a handwriting analysis.

[8](Ex 5 p 219-220).

Following the Show Cause hearing, counsel for the Commission employed a handwriting expert to examine the orders that Respondent had denied signing. On or about December 10, 2013, counsel for the Commission received the results of the analysis establishing that all orders specified bore Respondent's signature. (T 314). The results of the handwriting analysis were first disclosed to Respondent on January 3, 2014 in the Commission's response to certain discovery requests. (T 314). On February 5, 2014, counsel for the Commission received a letter from counsel for Respondent wherein counsel for Respondent stated, in pertinent part:

> First, although Judge Shoemake may not remember signing all of the orders involved, he steadfastly maintains he would not have signed any order without having been presented a reasonable request, and a logical reason for the relief. He does not simply just sign orders but like most judges, he cannot remember what Order he may have signed two (2) years earlier in any given file.

(Ex 13). In this letter, counsel for Respondent attempts to explain how the orders might have come into existence, but the letter does not include a clear admission that Respondent in fact signed the subject orders. Therefore, counsel for the Commission propounded requests for admissions. (Ex 10A). Respondent admitted signing the subject orders in his response to the requests for admissions, which were received on April 18, 2014. (Ex 10B). At the Formal Hearing Respondent admitted signing all of the orders in controversy. (T. 162; 172; 176; 181).

The Commission found Marilyn Newsome, the conservator, to be both sincere and credible. She testified that she had never spoken with Walker, McNulty, or Respondent concerning details of the construction of the house. (T 126). Her testimony was corroborated by McNulty's statement dated July 30, 2013, introduced into evidence by Respondent, in which McNulty admitted that Judge Walker directed her not to involve the conservator in construction of the home. (Ex 11). The conservator explained that it was during a hearing that Judge Walker first broached the subject of

building a new home. (T 144-45). She was never told how much the contractor would be paid from the ward's funds. (T 126-27). She also testified that, although she appeared before Judge Walker several times, she had never seen Respondent. (T 139, 154). According to McNulty's statement dated October 22, 2013, also introduced into evidence by Respondent, no inspections of the home were ever conducted and no formal walk-through was conducted upon "completion." The contractor "just gave the keys to Marilyn one day and that was it." (Ex 11).

Respondent testified at the Formal Hearing that he was justified in signing the orders after transferring the matter back to Walker because that was customary, he "didn't see anything wrong with it at that time . . . I have jurisdiction. And judges can accommodate one another in the same district." (T 202). In fact, he never gave that a second thought: "I don't remember that even being an issue." (T 341). Yet he then contradicted himself, saying that he only did it because McNulty told him that was what Walker wanted: "I continued to sign orders because Keely McNulty represented to me that Judge Walker wanted me to, on the house. I wouldn't have done it otherwise." (T 345). Not only are those two versions inconsistent, they contradict his position at the Show Cause hearing, which was that he would not have been presented with a petition and order in a matter assigned to Walker: "Why would anybody present me with a petition and an order when I'm not the judge in the case? I'm post one. This is post two." (Ex 4 p. 48). In fact, the assignment of the matter to Walker, not to him, was one of Respondent's fundamental premises at the time of the Show Cause hearing for why he never signed any of the four orders. And when he was asked at the Formal Hearing why, at the Show Cause hearing, he did not simply explain that he signed the orders because McNulty told him that was what Walker wanted, he had no answer: "I can't answer that. I don't know." (T 346).

Respondent was confronted at the Formal Hearing with his earlier testimony that he never

signs an order if the accompanying petition is not in proper form (Ex 4 p. 45; T 218), yet not one of the petitions that were filed was signed or verified by the conservator. (Ex 5 p. 127-31, 183-84, 185-98, 199-215). Respondent conceded nothing, despite the clear language of Uniform Chancery Court Rule 6.13 requiring that pleadings be signed and sworn to by fiduciaries. Respondent sought to justify that with the explanation that he had McNulty's signature. According to Respondent, McNulty was the fiduciary, and as counsel of record her unsworn petition was sufficient. Respondent sees no need in the requirement found in Uniform Chancery Court Rule 2.02 that pleadings be filed before presentation to him, and his customary practice, which he consistently indulged with McNulty, is to excuse the requirement found in Uniform Chancery Court Rule 5.05 that the court file be presented to him. According to her statement dated October 22, 2013, McNulty had been practicing law less than one year when she became involved in the conservatorship. (Ex 11).

The Commission found that Respondent sufficiently explained his involvement with the $23,500 "typographical error" in the bid amount, at least as that concerned the July 22, 2011 order that he re-drafted and signed. That order recited that the amount of C.T. Construction's low bid was $273,075.15. Yet the day before he had received from McNulty C.T. Construction's bid of $296,575.15. (Ex 24 p. 4). That lower amount was inadvertently inserted when Respondent dictated, or his assistant typed, the order. (T. 189-91, 305, 320-321; 323). The problem that creates for Respondent is the resulting conflict with his clear and unequivocal testimony at the Show Cause hearing. At that earlier hearing Respondent insisted that he was "certain" that when he drafted that July 22, 2011 order he looked at a bid in that lower amount, $273,075.15. (Ex 4 p. 20; T 186-187). As it turns out, of course, Respondent never had a bid from C.T. Construction for $273,075.15. (T

320). The Commission found that the wrong amount was included in the order Respondent prepared because Respondent was not paying attention - he never examined the bids McNulty faxed to him on July 21, 2011. Respondent simply copied that $273,075.15 from the proposed order that McNulty had submitted to him. Had Respondent taken the time to actually inspect the bids he would have seen not only that C.T. Construction's bid was for $296,575.15, not $273,075.15, but that it included a qualifier/escape clause printed immediately beneath that bid amount: "Cost projections are estimates only and subject to change:" (Ex 24 p. 4; T 321-323). That "subject to change" language should have rendered that bid unacceptable, or at least have prompted some inquiry. (T 323). Once accepted, that qualifier gave C.T. Construction the right to raise its price, burdening the ward's estate with price increases. None of the other four bids included that language. (Ex 24 p. 8-15; T 322). Yet Respondent accepted and approved that language, without any questions asked.

Respondent never explained the contradiction created by, on the one hand, his insistent and unequivocal testimony at the Show Cause hearing that he did not and would not sign an order without an accompanying petition with, on the other hand, his admission that he signed the July 28, 2011 and August 2, 2011 orders, for which no petitions exist (and none is referred to in those orders).

Concerning the January 25, 2012 order signed by Respondent awarding C.T. Construction $23,000 from the ward's estate for "stolen" materials, the conservator testified that she witnessed employees of C.T. Construction stealing the materials. (T. 119-20). Her testimony was directly supported by the July 30, 2013, statement of McNulty, offered into evidence by Respondent, who explained that the Conservator had complained to the contractor of seeing his own employees take the materials. (Ex 11). When Respondent was asked at the Formal Hearing about any basis for ordering that $23,000 payment, Respondent referenced a provision in the Construction Management

Agreement which he then recalled that McNulty had read and explained to him three years earlier. (T. 335-36). At the Show Cause hearing, when Respondent adamantly denied signing that order, he testified not only that he had no memory of any events related to that order, he insisted that he "would have had to have some kind of police report or sheriff's report or something on materials. And then I would have to have something to show that the ward was responsible." (Ex 4 p. 44-46; T 219-221). McNulty explained that she had no discussion with Respondent about that order. (Ex 11). According to her July 30, 2013, statement (offered by Respondent), she merely left it with his court administrator and he signed it, no questions asked. (Ex 11).

No issue was raised, and no evidence was presented, that Respondent engaged in any concerted action to award funds from the conservatorship which Respondent knew were not justified. Nor was an issue raised, or evidence presented, that Respondent benefitted financially from any of the orders he signed which resulted in dissipation of the ward's estate.

The record in this matter reveals that the Commission's findings of fact are supported by clear and convincing evidence. Additional facts, as necessary, will be added during the discussion of the issues.

SUMMARY OF THE ARGUMENT

The Commission did not err in rejecting Respondent's arguments regarding Rule 5C of the Rules of the Mississippi Commission on Judicial Performance. The Rule clearly states that the "[f]ailure to make timely notification shall not be grounds for dismissal of any investigation or proceeding."

The Commission did not err in rejecting Respondent's arguments regarding Rule 4 of the

Rules of the Mississippi Commission on Judicial Performance. Even if the proceedings before the Commission failed to remain confidential, dismissal of the proceedings is simply not a proper remedy.

The Commission did not err in rejecting Respondent's arguments regarding the amendment of the Formal Complaint. The Formal Complaint was properly amended pursuant to the Rules of the Mississippi Commission on Judicial Performance, the Mississippi Rules of Civil Procedure, and case law.

The Commission did not err in rejecting Respondent's arguments regarding alleged discovery violations. The record in this matter clearly establishes that no such discovery violations occurred.

Respondent entered several orders in the Newsome Conservatorship case even though the case had been transferred back to Judge Walker. Respondent entered several orders even though the conservator did not file petitions requesting the relief, nor was she given any notice of the filings. Respondent entered orders wherein there were no hearings or evidence submitted which would justify the relief granted. Respondent entered orders in violation of several Rules of the Uniform Chancery Court Rules, case law, and statutes. At the Show Cause Hearing held on November 1, 2013, Respondent testified under oath and gave deceptive and misleading responses to the Commission. Respondent's actions violated Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code of Judicial Conduct thereby constituting a violation of Section 177A of the Mississippi Constitution of 1890, as amended. Respondent's actions constitute willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute as defined by the Mississippi Supreme Court. ***Miss. Comm'n on Judicial Performance v. Harris***, 131 So. 3d 1137, 1142 (Miss. 2013) (quoting ***In Re Quick***, 553 So. 2d 522, 524-25 (Miss. 1989)).

Pursuant to Section 177A of the Mississippi Constitution of 1890, as amended, Respondent should be removed from office by the Supreme Court of Mississippi, fined $2,500, and assessed the costs of these proceedings in the sum of $8,882.67. This sanction is consistent with like cases, fits the offense and satisfies the purpose of sanctions.

ARGUMENT

I. THE COMMISSION DID NOT ERR IN REJECTING RESPONDENT'S ARGUMENTS REGARDING RULE 5C OF THE RULES OF THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

Since the Rules of the Mississippi Commission on Judicial Performance prohibit the filing of reply briefs with this Court,[9] and given the arguments that Respondent made throughout these proceedings, including, but not limited to, "Respondent's Findings of Fact and Conclusions of Law" (CP 740-759), "Respondent's Objections to the Findings and Recommendation of Committee" (CP 820-862) and the "Motion of Respondent to Retain Confidentiality of the Record, Orders and Proceedings in this Matter Before the Supreme Court of the State of Mississippi" which was filed with this Court, counsel for the Commission will preemptively address several issues that Respondent may raise.

First, Respondent has argued that Rule 5C of the Rules of the Mississippi Commission on Judicial Performance has been breached and that these proceedings should be dismissed. Rule 5C states:

> **C. Notice to Judge**. The Commission shall not notify a judge of any initial complaint dismissed after preliminary inquiry, unless otherwise determined by the Commission.

[9]Rule 10D of the Rules of the Mississippi Commission on Judicial Performance.

> When the initial complaint is not dismissed, within ninety (90) days of its receipt the judge shall be notified of the investigation and nature of the charge. **Failure to make timely notification shall not be grounds for dismissal of any investigation or proceeding**. Such notice shall be in writing and may be transmitted by a member of the Commission, the executive director, any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record.
>
> When a judge has been notified of an investigation and the Commission has dismissed the matter, the judge shall be so notified and the file shall be closed.

Rule 5C (emphasis added). The Rule clearly states that the failure to timely notify the judge "shall not be grounds for dismissal." *Id.*

Counsel for the Commission admit that the initial complaint in this matter was received on or about May 3, 2013 and Respondent was not provided written notice of the complaint until he was served with the Notice of Formal Complaint and the Formal Complaint in October 2013. The initial complaint was first considered by the Commission at its regularly scheduled meeting on June 14, 2013.[10] At that meeting, the Commission ordered that the allegations be investigated. The next Commission meeting was held on August 9, 2013. At that time the matter was still being investigated. The results of the investigation were reported to the Commission at the regularly scheduled meeting on October 11, 2013. At that meeting, the Commission found probable cause to file a Formal Complaint. The Formal Complaint was filed on October 17, 2013.

Respondent's argument regarding Rule 5C was addressed by the Commission in the

[10]Because of a serious lack of funding spanning several years, the Commission can only afford to meet every other month. The first Commission meeting following the receipt of the initial complaint was June 14, 2013. Ninety days from May 3, 2013 was August 1, 2013. The next scheduled meeting of the Commission was not until August 9, 2013. It should be noted that Respondent met with the former Executive Director of the Commission and other Commission staff on August 23, 2013 and the Newsome Conservatorship case was discussed.

Commission Findings of Fact and Recommendation. (Commission Findings p. 20). The Commission stated:

> Respondent is correct that the rule requires notice within ninety days. However, that same rule expressly states that non-compliance shall not be a basis for dismissal of the proceedings. If Respondent did not know that a complaint was pending against him when he was first interviewed at the Commission's offices, and/or if Respondent did not have adequate time within which to familiarize himself with the conservatorship proceedings prior to the Show Cause hearing **(which Respondent testified at the Show Cause hearing was not the case)**, Respondent could have indicated that he was unsure, he was unprepared or that he was otherwise unable to say whether the signatures on the orders were actually his or not. **Instead he chose to be absolutely certain, and to deny that the signatures were his**.

(Commission Findings p. 20) (T. 182; Ex 4 p. 10; 23-24; 49) (emphasis added).

In ***Miss. Comm'n on Judicial Performance v. Russell***, this Court stated:

> To hold judges exempt from professional misconduct proceedings would **deprive members of the public of any remedy**. Moreover, to hold that judges may not be sanctioned for actions which exceed their lawful authority would totally **disregard the protection of the public**, the **administration of justice**, the **maintenance of professional standards**, and the **deterrence of similar conduct**. "We discipline a judge to reassure the citizens . . . that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men."

Russell, 691 So. 2d 929, 948 (Miss. 1997) (quoting ***In re Kneifl***, 217 Neb. 472, 351 N.W. 2d 693) (Neb. 1984) (emphasis added)). The record in this matter clearly establishes that Respondent has committed willful misconduct in office and conduct which is prejudicial to the administration of justice and which brings the judicial office into disrepute pursuant to Section 177A of the Mississippi Constitution. This Court must protect the people of Mississippi from such judicial misconduct. ***Russell***, 691 So. 2d at 947; Rule 1B of the Rules of the Mississippi Commission on Judicial Performance. The Rules of the Mississippi Commission on Judicial Performance, including Rule 5C, "shall be liberally interpreted so as to carry out the mandate of the electorate by its approval

of Section 177A of the Mississippi Constitution of 1890." Rule 1C of the Rules of the Mississippi Commission on Judicial Performance. It is submitted that Respondent's argument regarding Rule 5C is without merit and should be rejected.

II. THE COMMISSION DID NOT ERR IN REJECTING RESPONDENT'S ARGUMENTS REGARDING RULE 4 OF THE RULES OF THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

Respondent has argued that the confidentiality of these proceedings was breached and that these proceedings should be dismissed. Section 177A of the Mississippi Constitution states, in pertinent part:

> All proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After a recommendation of removal or public reprimand of any justice or judge is filed with the clerk of the Supreme Court, the charges and recommendations of the commission shall be made public. The commission may, with two-thirds (2/3) of the members concurring, recommend to the Supreme Court the temporary suspension of any justice or judge against whom formal charges are pending. All proceedings before the Supreme Court under this section and any final decisions made by the Supreme Court shall be made public as in other cases at law.

Miss. Const. art. 6, § 177A. Rule 4 of the Rules of the Mississippi Commission on Judicial Performance states:

> **RULE 4. CONFIDENTIALITY**
>
> **A. All Proceedings**. All proceedings before the Commission shall be confidential, except upon unanimous vote of the Commission, as prescribed in Section 177A of the Mississippi Constitution of 1890. Confidentiality shall attach upon the initiation of an inquiry and shall include all records, files and reports of the Commission. All proceedings before the Supreme Court and any final decisions made by the Supreme Court shall be made public as in other cases at law. However, an appeal from a private admonishment by the Commission shall be confidential unless on appeal the Supreme Court imposes sanctions harsher than the private admonishment.
>
> **B. Disclosure**. By unanimous vote, the Commission may waive confidentiality and disclose such information deemed appropriate by the Commission. Such action may be taken upon the Commission's own motion or upon written request of the judge.

C. Violation by Staff. Employment of the executive director or any member of the staff may be terminated for violation of confidentiality.

It must first be noted that neither the Constitution, nor Rule 4 provide that a case should be dismissed if confidentiality is breached. The only penalty stated is for a violation by Commission staff is that "Employment of the executive director or any member of the staff **may** be terminated for violation of confidentiality." Rule 4C (emphasis added). There is simply no evidence that a member of the Commission staff violated the confidentiality provisions.

Respondent complains that counsel for Marilyn Newsome, the complainant, sent information by facsimile to the Commission office. In order to properly investigate and prosecute cases at the Commission, the complainants, and when available, their counsel are consulted. Commission staff advise all potential witnesses, including complainants and their counsel, of the confidentiality provisions. The mere fact that the attorney for the complainant sent information to Commission staff does not mean that confidentiality was breached.

Respondent has also complained that information about these proceedings was reported by a newspaper in his judicial district. Commission staff were shocked to learn of the existence of the newspaper article. On January 23, 2014, the Magee Courier published an article entitled "Simpson County legal system continues to be disgrace." The article mentions that Respondent denied signing orders and that the orders were sent for forensic analysis.[11] Commission staff contacted the author of the article to determine how the information was obtained. The author of the article executed a sworn affidavit wherein he stated:

1. That he is the Editor/Publisher of the Magee Courier, a newspaper located in

[11]*See* Exhibit 1 to "Respondents [sic] Second Motion to Dismiss." (Cp. 83).

Simpson County, Mississippi.

2. That on or about the 23rd day of January, 2014 he authored and published an article in the Magee Courier entitled "Simpson County legal system continues to be disgrace." In that article it was reported that Judge David Shoemake stated he did not sign certain orders pertinent to the Victoria Newsome Conservatorship and that a forensic analysis of such orders had been requested.

3. That he has not ever had any communication with Darlene Ballard, Executive Director of the Mississippi Commission on Judicial Performance, or any other members of the staff or Commission, regarding David Shoemake or the Victoria Newsome Conservatorship until recently when Darlene Ballard contacted him to inquire about his sources for the above story.

4. That the reports contained in the article cited above are common knowledge within the legal community of Simpson County, Mississippi and the information reported came from those within such community at a time close to the publication date of the article.

Exhibit 6 to the "Commission's Response to Respondent's Second Motion to Dismiss. (CP 212-213). As discussed above, during the November 1, 2013 Show Cause Hearing Respondent adamantly denied signing the subject orders in the Newsome conservatorship case. Shortly thereafter, counsel for the Commission decided to hire a handwriting expert to determine if Respondent signed the orders. The handwriting expert required original examples of Respondent's signature. On November 20, 2013, the Investigator for the Commission personally served two Subpoenas Duces Tecum Instanter upon the Chancery Clerk of Simpson County, Mississippi. One subpoena required the immediate production of five original orders signed by Respondent in the Newsome Conservatorship case. The other subpoena required the immediate production of all original orders signed by Respondent in ten unrelated cases pending in the Simpson County Chancery Court. The chancery clerk delivered those original orders to the Investigator and placed copies of the orders and the subpoenas in the chancery court files. The original orders were sent to

the handwriting expert on November 21, 2013. The expert's report was received by Commission staff on December 10, 2013. In response to discovery propounded by Respondent, on January 3, 2014 counsel for the Commission forwarded copies of the report from the handwriting examiner to Respondent's counsel.

Even if confidentiality was breached, dismissal of these proceedings is not appropriate. As discussed supra,

> To hold judges exempt from professional misconduct proceedings would **deprive members of the public of any remedy**. Moreover, to hold that judges may not be sanctioned for actions which exceed their lawful authority would totally **disregard the protection of the public**, the **administration of justice**, the **maintenance of professional standards**, and the **deterrence of similar conduct**. "We discipline a judge to reassure the citizens . . . that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men."

Russell, 691 So. 2d at 948 (citations omitted). The record in this matter clearly establishes that Respondent has committed willful misconduct in office and conduct which is prejudicial to the administration of justice and which brings the judicial office into disrepute pursuant to Section 177A of the Mississippi Constitution. This Court must protect the people of Mississippi from such judicial misconduct. ***Russell***, 691 So. 2d at 947; Rule 1B of the Rules of the Mississippi Commission on Judicial Performance. The Rules of the Mississippi Commission on Judicial Performance, including Rule 4, "shall be liberally interpreted so as to carry out the mandate of the electorate by its approval of Section 177A of the Mississippi Constitution of 1890." Rule 1C of the Rules of the Mississippi Commission on Judicial Performance. It is submitted that Respondent's argument regarding Rule 4 is without merit and should be rejected.

III. THE COMMISSION DID NOT ERR IN REJECTING RESPONDENT'S ARGUMENTS REGARDING THE AMENDMENT OF THE FORMAL COMPLAINT

Respondent appears to assert that the Formal Complaint was amended improperly. For example, in Respondent's "Motion to Appear before the Full Mississippi Commission on Judicial Performance or, in the Alternative, to Exclude Participation of Committee Members from Review of the Findings and Recommendations of the Committee," Respondent noted that the committee of the Commission heard the motions to permit the amendments to the Formal Complaint and then Respondent made the broad statement that the committee "did not have the authority to do." (CP 864). However, Respondent never supported that statement. At the time the motions to amend the Formal Complaint were heard by the committee of the Commission, Respondent failed to make any argument or objection that the committee did not have the authority to grant a motion to amend the Formal Complaint. On June 27, 2014, counsel for the Commission filed its Motion to Amend Formal Complaint. (CP 389-399). This motion was set to be heard on July 11, 2014. On July 7, 2014, counsel for Respondent emailed the "Objection and Response of Chancellor David Shoemake to Motion by Darlene Ballard to Amend Formal Complaint" to the committee and counsel for the Commission.[12] (CP 417-452). In this pleading, Respondent made personal attacks against the Executive Director of the Commission and attempted to argue the underlying merits of the allegations in the proposed Amended Formal Complaint. However, Respondent never asserted that the committee of the Commission lacked the authority to grant the motion to amend. *Id.* On July 11, 2014, the committee heard extensive arguments regarding several pending motions. Again, Respondent never argued that the committee lacked the authority to grant the motion to amend the

[12]The original copy of that pleading was received and stamped "filed" on July 11, 2014.

Formal Complaint. (07/11/2014 T 121-126). The committee's Order Granting Motion to Amend Formal Complaint was entered on July 30, 2014. (CP 468-469). On September 26, 2014, counsel for the Commission filed the "Second Motion to Amend Formal Complaint." (CP 486-498).[13] The motion was set to be heard on October 22, 2014. Respondent did not file a written response to this motion. By agreement of the parties, the October 22, 2014 motion was heard telephonically and no court reporter was present. At that hearing, counsel for Respondent did not argue that the committee did not have the authority to grant a motion to amend the Formal Complaint. The committee's Order Granting Second Motion to Amend Formal Complaint was entered on October 22, 2014. (CP 501).

At the hearings on each motion, each party was given ample opportunity to make any arguments they felt necessary. Respondent never objected or argued that the committee did not have the authority to grant a motion to amend the Formal Complaint. "[A] trial court will not be put in error on appeal for a matter not presented to it for decision." ***McNeese v. McNeese***, 119 So. 3d 264, 276 (Miss. 2013) (quoting ***McDonald v. McDonald***, 39 So. 3d 868, 885 (Miss. 2010) (quoting ***Mills v. Nichols***, 467 So. 2d 924, 931 (Miss. 1985)). Respondent's argument is procedurally barred.

Without waiving the bar, Respondent's argument is also without merit. Counsel for the Commission would show that Respondent finally[14] admitted that he had in fact signed the orders in controversy in his response to the requests for admissions, which were received by Commission staff

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[13]Counsel for Respondent had pointed out that the there were errors in the facts stated in paragraph 10 of the Amended Formal Complaint. (See e.g., CP 417). The second motion to amend was filed in an effort to correct those errors. (CP 487). It is counsel for the Commission's opinion that the amendment actually eliminated an allegation of misconduct against Respondent and, therefore, benefitted Respondent.

[14]Contrary to Respondent's assertions, the letter his attorney sent on February 5, 2014 did not contain a clear admission that Respondent signed the orders in controversy.

on April 18, 2014. (Ex 10B). Commission staff studied the issue and determined that they should seek to amend the Formal Complaint. Case law from this Court, the Rules of the Mississippi Commission on Judicial Performance, and the Mississippi Rules of Civil Procedure allow the committee of the Commission to rule on a motion to amend the Formal Complaint. In ***Miss. Comm'n on Judicial Performance v. Hopkins***, a Formal Hearing was held before a committee of the Commission. This Court noted that

> [a]t the conclusion of the testimony, the Commission moved to amend its Complaint to conform the pleadings to the evidence under Rule 15(b) of the Mississippi Rules of Civil Procedure. The [committee] allowed the Complaint to be amended to include charges of misconduct in regard to the untimely signing of the docket book and the remark made by Judge Hopkins to the newspaper about Agent Bethay.

Hopkins, 590 So. 2d 857, 861 (Miss. 1991). Rule 3I of the Rules of the Mississippi Commission on Judicial Performance states:

> **I. Rules and Forms**. These rules shall control complaints to, investigations by, and proceedings by the Commission. The Commission may, for good cause, suspend any or all of its rules upon a two-thirds (2/3) vote of the Commission. The Commission shall prescribe such forms as it deems appropriate.

Rule 8.B of the Rules of the Mississippi Commission on Judicial Performance states:

> **B. Discovery and Procedure**. In all formal proceedings the Mississippi Rules of Civil Procedure shall be applicable except as otherwise provided in these rules. The sole parties to formal proceedings shall be the Commission and the judge.

Rule 8.D of the Rules of the Mississippi Commission on Judicial Performance states, in pertinent part:

> The Commission shall designate one (1) of its judicial or attorney members to preside over each formal hearing. He **shall dispose of all preliminary matters** and shall rule on procedural and evidentiary matters during the course of the hearing.

Rule 8.D (emphasis added).

Since the Rules of the Mississippi Commission on Judicial Performance do not contain a specific rule regarding the amendment of the Formal Complaint, Rule 15 of the Mississippi Rules of Civil Procedure controls. Rule 15(a) of the Mississippi Rules of Civil Procedure states:

> **(a) Amendments**. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. **Otherwise a party may amend a pleading only by leave of court** or upon written consent of the adverse party; **leave shall be freely given when justice so requires**. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

M.R.C.P. 15(a) (emphasis added). This Court has consistently held that "'freely given' means that 'if the underlying facts or circumstances relied upon by a plaintiff **may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits**.'" ***Lone Star Ind. Inc., v. McGraw***, 90 So. 3d 564 (Miss. 2012) (quoting ***Estes v. Starnes***, 732 So. 2d 251, 252 (Miss.1999)) (emphasis added). The committee of the Commission properly granted the motions to amend the Formal Complaint and Respondent's arguments to the contrary are without merit.

IV. THE COMMISSION DID NOT ERR IN REJECTING RESPONDENT'S ARGUMENTS REGARDING ALLEGED DISCOVERY VIOLATIONS

Counsel for the Commission contend that as soon as Respondent realized that he had no defense to the allegations, he attempted to create distractions for the committee of the Commission and the full Commission to take away from the merits of this case and further attempted to delay these proceedings. If Respondent raises arguments on appeal regarding alleged discovery violations,

those arguments are merely intended to distract this Court from the serious issues involved in this case. Although counsel for Respondent complained about the Commission's discovery responses, counsel for Respondent failed to make a good faith effort to resolve any purported discovery issues with counsel for the Commission. *See* ***Mississippi Farm Bureau Mutual Insurance Co. v. Parker***, 921 So. 2d 260 (Miss. 2005). In fact, counsel for Respondent never contacted counsel for the Commission to discuss any of the purported concerns with the Commission's discovery responses that he raised in his various pleadings.

The discovery in this case has been extensive. Respondent has filed several motions and other pleadings with the committee of the Commission wherein he alleged that counsel for the Commission committed discovery violations. Each time counsel for the Commission proved that no discovery violations occurred. (See e.g., 07/11/2014 T 77-121; CP 535-609; T 17-31).[15] The Formal Hearing in this matter was originally set for December 18 and 19, 2014.[16] On November 18, 2014, counsel for Respondent contacted counsel for the Commission by telephone and requested that the Formal Hearing be continued because he wanted to take a vacation. Counsel for the Commission would not agree to a continuance. The next day, counsel for Respondent alleged that certain emails printed by Keely McNulty between McNulty and Merkel and Cocke had been "withheld" by Commission counsel. Commission counsel immediately responded and informed counsel for

[15]Please see the "Commission's Response and Objection to Respondent's Motion for Additional Time to File Answer to Second Amended Formal Complaint, Motion to Conduct Additional Disovery, and Motion for a Continuance of Formal Hearing" filed on December 1, 2014. This pleading includes a very detailed discussion of the procedural history of the case and discusses in great detail all of the discovery up to the date of filing. (CP 535-609).

[16]After the committee of the Commission denied Respondent's motion for a continuance of the Formal Hearing, Counsel for Respondent reported to the committee on December 17, 2014 that he was ill. The committee rescheduled the Formal Hearing until March 12, 2015.

Respondent that those particular emails had been hand delivered to counsel for Respondent on October 31, 2013 and, out of an abundance of caution, produced again in the Commission's supplemental responses to requests for production on October 31, 2014. As a courtesy, on November 19, 2014, Mrs. Menapace personally scanned the stack of emails into an electronic format and emailed them to counsel for Respondent.

On November 24, 2014, Respondent filed his "Motion of Chancellor David Shoemake for Additional Time to File his Answer to Second Amended Complaint, Conduct Additional Discovery, and for Continuance of Scheduled Hearing December 18 and 19, 2014." (CP 512-534). On December 1, 2014, the Commission filed its response and objection to that motion. (CP 535-609). In this response, the Commission discussed the discovery in this case in great detail. (CP 542-552).[17] The committee of the Commission denied Respondent's motion on December 3, 2014 and their "Order Denying Respondent's Motion for Additional Time to File Answer to Second Amended Complaint, Conduct Additional Discovery, and for Continuance of Scheduled Hearing" was entered on December 5, 2014. (CP 661-662).

On December 17, 2014, counsel for the Respondent contacted the Commission and stated that he was ill and unable to attend the scheduled hearing the next day. Therefore, the Formal Hearing had to be continued due to Respondent's counsel's illness. In an effort to be cooperative, on December 18, 2014, counsel for the Commission offered to extend the discovery deadline for the limited purpose of allowing Respondent to take certain depositions about which he had complained

[17]Since the discovery process was discussed in such detail in this response, in an effort to avoid being repetitive, much of it is not repeated herein.

in his motion.[18] Respondent's counsel and the committee agreed. (*See* Amended Scheduling Order CP 702). Upon the expiration of the extended discovery deadline, Respondent had only taken Marilyn Newsome's deposition.

The production of certain emails from Keely McNulty requires some additional discussion. On the afternoon of October 30, 2013, Keely McNulty delivered to counsel for the Commission copies of email communications between herself, Judge Joe Dale Walker, Respondent, and others. These copies were divided into two sets of documents. In one set, many of the pages state "8/5/2013"[19] on the bottom right corner and generally include communications between McNulty and Charles Merkel, staff from Merkel & Cocke, Richard Courtney, staff from Frascogna Courtney, and a few others. This set of documents totals 159 pages. In the other set, many of the pages state "10/29/2013" on the bottom and generally include communications between McNulty and Judge Joe Dale Walker and his court administrator. This set of documents totals 93 pages. It is submitted that "8/5/2013" and "10/29/2013" are the dates McNulty printed these emails.

The Commission office was hectic on October 31, 2013 and November 1, 2013. On October 31st, the committee was conducting the show cause hearing for Judge Joe Dale Walker - the companion case to the present case. The office was full of witnesses and attorneys from

[18]Counsel for the Commission's email to opposing counsel and the committee stated, in pertinent part: "Since Mr. Jones now has his continuance, Darlene and I will agree to a limited extension of the discovery deadline for the sole purpose of allowing depositions of witnesses listed in discovery responses filed by either party on or before October 31, 2014. We would agree to conducting these depositions on or before Thursday, January 8, 2015 - if the Formal Hearing begins on January 15, 2015. If the Formal Hearing is scheduled for sometime in February or March or later, we would agree to conducting these depositions on or before Friday, January 23, 2015."

[19]The pages without "8/5/2013" or "10/29/2013" appear to be the documents which were referenced in the emails as attachments.

Respondent's and Walker's district. During several breaks in the hearing on October 31, 2013, counsel for Respondent met with counsel for the Commission regarding Respondent's upcoming Show Cause Hearing. During one of these breaks, Mrs. Ballard informed counsel for Respondent that she had just received the copies of the emails described above. Mrs. Ballard showed counsel for Respondent the large stack of emails. Mrs. Ballard then delivered the copies of these emails to Commission staff with the instruction that a photocopy be made and immediately delivered to counsel for Respondent. Counsel for the Commission then returned to the hearing room.

Counsel for Respondent has stated in countless pleadings that on October 31, 2013 Mrs. Ballard handed him one single sheet of paper. Counsel for Respondent has alleged that using that single sheet of paper, Respondent's court administrator was able to find emails between Keely McNulty and Respondent, which he offered as an exhibit at the show cause hearing. (Ex 6 sub-exhibit 2). However, at the Show Cause Hearing, Respondent also offered other documents. (Ex 6 sub-exhibit 3-13). An examination of the exhibits shows that some of these documents were actually from the "stack" of emails that Mrs. Ballard provided the day before.[20] In fact a careful examination of Respondent's pleadings and statements reveal that he received much more than a single sheet of paper and support the conclusion that he, in fact, received all of these emails on October 31, 2013.

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[20]During the Show Cause hearing on November 1, 2013, Respondent introduced as an exhibit eight of the emails that he received from Commission counsel, with their attachments, - totaling 15 pages. (Ex 6 sub-exhibit 3-13). These emails could not have been printed from Respondent's computer on October 31, 2013 because at the bottom of many of the pages they bear the identical language found on emails which state "10/29/2013" on the bottom discussed above. And the one email that was printed from Respondent's computer states "David Shoemake" at the top and does not have "http://us-mg5.mail.yahoo.com/neo/launch?.rand=9eombmntlp6un 10/29/2013" across the bottom.

For example, during the Show Cause hearing counsel for Respondent made a statement which indicates that Mrs. Ballard delivered multiple pages of emails to Respondent. (Ex 4 p 33). During the July 11, 2014 motions hearing, Respondent offered as exhibits nine emails from the set described above which state "10/29/2013" on the bottom. (*See* Exhibit 1 p 103-114 [21]to the July 11, 2014 hearing). On October 29, 2014, the "Answer of Respondent Judge David Shoemake to Interrogatories 7, 8, 9, 10, 12 and Response to Requests for Production of Documents No. 3 & 4" was received by Commission counsel. That production included Exhibit 7 which included a time-line with statements from Respondent wherein he states that he received a "stack" of emails from Mrs. Ballard. (T. 23-24). Included with that production were numerous copies of emails that Mrs. Ballard had provided to Respondent the day before his Show Cause hearing.

Finally, during the Formal Hearing, Respondent offered Exhibits 1, 2 and 3 into evidence. (T 15). Respondent stated that Exhibit 1 is a box of documents;[22] Exhibit 2 is the "document production of October 31" and Exhibit 3 is the documents produced on November 19, 2014. (T 15). An examination of these three exhibits reveals that Exhibit 2 contains "Keely McNulty emails" described above bearing both "8/5/2013" and "10/29/2013" on the bottom right corner. (for example, see pages 14-15; 18; 22-23; 29; 32; 39; 44; 47; 52-55; 64; 75-76; 89; 92-95; 107-108; 111; 115-116; 122; 125; 132; 137; 140; 145-148; 157; 168-169; 182; 185-190; 203-222; 225-227; 230-231; 237-239; 242-260; 267; 269-271; 278). Respondent agreed that all supplementation of discovery had to be complete by October 31, 2014. These exhibits prove that counsel for the

[21]The numbering of these exhibits are quite confusing and the pages is not consecutively numbered.

[22]Exhibit 1 includes but is not limited to documents Commission staff hand delivered to Counsel for Respondent on August 29, 2014.

Commission timely and fully complied with discovery deadlines.

Finally, in its Findings, the Commission stated:

> if Respondent did not have adequate time within which to familiarize himself with the conservatorship proceedings prior to the Show Cause hearing (**which Respondent testified at the Show Cause hearing was not the case**), Respondent could have indicated that he was unsure, he was unprepared or that he was otherwise unable to say whether the signatures on the orders were actually his or not. Instead **he chose to be absolutely certain, and to deny that the signatures were his**.

(Commission Findings p. 20) (T. 182; Ex 4 p. 10; 23-24; 49) (emphasis added). Additionally, none of the documents that Respondent has complained about would have had any impact on whether he signed orders in the conservatorship case without proper petitions being filed, or without notice to the conservator. It is submitted that counsel for the Commission timely complied with the rules of discovery in this matter, that no discovery violations occurred, and that Respondent's arguments on this issue are without merit.

V. THE CONDUCT OF RESPONDENT CONSTITUTED WILFUL MISCONDUCT IN OFFICE AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE WHICH BRINGS THE JUDICIAL OFFICE INTO DISREPUTE, PURSUANT TO SECTION 177A OF THE MISSISSIPPI CONSTITUTION OF 1890, AS AMENDED

The Mississippi Supreme Court must decide whether Respondent's conduct constitutes willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute pursuant to Section 177A of the Mississippi Constitution, as amended. If it is determined that Respondent's conduct constitutes willful misconduct in office, then the Court must determine the appropriate sanction.

The Mississippi Supreme Court has consistently held that "willful misconduct in office" is:

> (T)he improper or wrong use of power of his office by a judge acting intentionally

> or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a [mere] act of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constituted bad faith. . . .
>
> Willful misconduct in office of necessity is conduct prejudicial to the administration of justice which brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute.

Miss. Comm'n on Judicial Performance v. Harris, 131 So. 3d 1137, 1142 (Miss. 2013) (quoting ***In Re Quick***, 553 So. 2d 522, 524-25 (Miss. 1989)); ***Miss. Comm'n on Judicial Performance v. Bowen***, 123 So. 3d 381 at 384 (Miss. 2013); ***Miss. Comm'n on Judicial Performance v. Sanford***, 941 So. 2d 209, 212-13 (Miss. 2006) (quoting ***Gibson***, 883 So. 2d at 1157).

"[A]ctual willfulness is not always required, as a judge's 'negligence or ignorance not amounting to bad faith' can have the same effect of being prejudicial to the administration of justice and bringing the judicial office into disrepute." ***Miss. Comm'n on Judicial Performance v. Fowlkes***, 121 So. 3d 904 at 907 (Miss. 2013) (quoting ***Miss. Comm'n on Judicial Performance v. Hartzog***, 32 So. 3d 1188, 1193 (Miss. 2010) (quoting ***In re Anderson***, 451 So. 2d 232, 234 (Miss. 1984)). "'[M]isconduct does not have to be embedded in any form of bad behavior' – ignorance and incompetence can amount to conduct that violates Section 177A of the Mississippi Constitution." ***Harris***, 131 So. 3d at 1142 (quoting ***Quick***, 553 So. 2d at 527).

Violations of Canons of the Code of Judicial Conduct can amount "to a violation of Section 177A of the Mississippi Constitution, where [the judge's] actions [constitute] willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into

disrepute." ***Fowlkes***, 121 So. 3d at 907.

28. "According to its Preamble, the Mississippi Code of Judicial Conduct, . . . establishes 'standards of ethical conduct of judges.'" ***In Re Bell***, 962 So. 2d 537, 542 (Miss. 2007) (citations omitted). The Preamble states, in pertinent part:

> The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.
>
> The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

The Second Amended Formal Complaint asserted that by engaging in the above stated conduct, Respondent violated Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8), and 3C(1) of the Code of Judicial Conduct of Mississippi. Those Canons state, in pertinent part:

> **CANON 1 A Judge Shall Uphold the Integrity and Independence of the Judiciary**
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.
>
> ***Commentary*** Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely,

violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether, based on the conduct, the judge's impartiality might be questioned by a reasonable person knowing all the circumstances.

B. Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges.

Commentary Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of th executive and legislative branches. Respect for the judicial office facilities the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

. . . .

(7) A Judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.

. . . .

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

. . . .

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

Respondent's conduct constitutes willful misconduct in office. Respondent's conduct regarding the administration of the Victoria Newsome Conservatorship violates Canons 1, 2A, 2B, 3B(2), 3B(7), 3B(8) and 3C(1) of the Code of Judicial Conduct of Mississippi.

Respondent repeatedly failed to exercise diligence and oversight to protect the assets and best interests of the ward. For example, Respondent did not enforce Uniform Chancery Court Rule ("UCCR") 2.02 (requiring pleadings, i.e., petitions to be filed with the clerk before being presented to him), 5.05 (presentation of the court file), and, most importantly, 6.13 (execution and verification of pleadings by the fiduciary). Those failures likely did result In dissipation of the ward's assets.

> To be sure, Respondent ignored altogether his responsibilities to serve as the "superior guardian" of the ward...
>
> (Commission Findings p. 19)

Respondent's conduct regarding his testimony given at the November 1, 2013 Show Cause hearing violates Canons 1, 2A, and 3B(2) of the Code of Judicial Conduct of Mississippi.

> Respondent did not testify truthfully at the Show Cause hearing concerning his signatures on the orders, and that his explanations at both the Show Cause hearing and the Formal Hearing were inconsistent, not credible and were intended to mislead the Commission about his failures. His testimony at both hearings showed a lack of candor.
>
> (Commission Findings p. 20)

VI. RESPONDENT SHOULD BE REMOVED FROM OFFICE BY THE SUPREME COURT OF MISSISSIPPI AND FINED $2,500 PURSUANT TO SECTION 177A OF THE MISSISSIPPI CONSTITUTION OF 1890, AS AMENDED, AND ASSESSED THE COSTS OF THE PROCEEDINGS IN THE SUM OF $5,882.67

In determining the appropriate sanctions, the Mississippi Supreme Court has held:

> The sanctions in judicial-misconduct cases should be proportionate to the judge's offense. To determine whether the recommended sanctions are proportionate to the offense, this Court follows a six-factor test, which includes: "(1) the length and character of judge's public service; (2) whether there is any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct;" (5) whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position; and "(6) the presence or absence of mitigating or aggravating factors."

Harris, 131 So. 3d at 1144 (citing ***Miss. Comm'n on Judicial Performance v. Boykin***, 763 So. 2d 872, 876 (Miss. 2000); ***Skinner***, 119 So.3d at 300, 307).

(1) The length and character of the judge's public service.

Respondent became a judge in January 2011. Respondent is in his second term as a Chancellor.

(2) Whether there is any prior case law on point.

The Supreme Court has been very clear on the seriousness of a judge not making truthful statements while under oath in a Commission hearing.

> A proceeding before the Commission on Judicial Performance is no different than from a trial and a trial is a proceeding designed to be a search for the truth. When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.

Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107, 115 (Miss. 2009). Accordingly in ***Miss. Comm'n on Judicial Performance v. Williard***, a case in which the respondent judge's testimony was deemed to be not credible by the Commission, the Supreme Court found that those statements were willful misconduct. The Supreme Court stated: "[t]he commission concluded Willard's testimony was tantamount to perjury" during his Commission hearing. The Supreme Court found the "[t]he Commission correctly concluded Willard's lack of candor constituted willful misconduct in violation of Section 177A of the Mississippi Constitution." ***Williard***, 788 So. 2d 736, 744 (Miss. 2001).

(3) The magnitude of the offense and the harm suffered.

Respondent signed orders without petitions being filed with the clerk or presented to him for filing and without notice to the conservator. But worse, he authorized actions which benefitted other individuals to the detriment of the ward. The actions authorized by the Respondent continue to harm the ward to this day. The ward now lives in a defective home and is subject to paying astronomical amounts of money monthly to compensate for the building of a home she never wanted or requested.

Respondent's actions did not only irreparably harm the trust that the Newsome family has in the judiciary, but it also harmed the citizens of the Thirteenth Chancery District. The public's confidence in, and perception of, the judiciary as a whole was diminished. Respondent ignored the mandates of the Code of Judicial Conduct as well as the laws and rules that govern practice in Mississippi Chancery Courts, to the detriment of citizens of this state.

(4) Whether the misconduct is an isolated incident or evidences a pattern of conduct.

The conduct concerning the Victoria Newsome Conservatorship occurred during Respondent's first term as a Chancellor. However, during the March 12, 2015, Formal Hearing, Respondent's testimony suggests that he handled many cases before him in the same manner that he handled the Victoria Newsome Conservatorship. "Respondent's testimony describes a pattern of conduct that he has followed since he took office – petitions not required, fiduciary verifications not required, evidence not required." (Commission Findings p. 28).

(5) Whether the conduct was willful, intended to deprive the public of assets, or if it exploited the judge's position.

The Supreme Court recently "modified the moral turpitude factor to consider instead 'the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it.'" ***Harris***, 131 So. 3d at 1146 (quoting ***Skinner***, 119 So.2d at 307). "To determine the extent to which the conduct was willful, '[the Supreme Court] will examine 'whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently.'" ***Id.***

In the actions regarding the administration of the Newsome Conservatorship, Respondent

was swayed by another judge to involve himself in a matter that in its essence was unethical and unlawful. Respondent's actions when signing the orders presented to him by McNulty may not have been intentional, but there is no denying that his actions were not performed with the due diligence that is required of a chancellor. Respondent testified that he trusted and had faith that lawyers presented him with documents that were truthful and in the best interest of their clients. However, by relying on lawyers to be ethical and forthright, and failing to follow the Uniform Chancery Court Rules and other laws, Respondent failed in one of his most important roles as a chancellor, which is to be the superior guardian over the ward. ***Mathews v. Williams***, 633 So. 2d 1038 (Miss. 1994); ***Union Chevrolet Co. v. Arrington***, 138 So. 593 (Miss. 1932). "Claim of ignorance of the duties of his office or negligence in carrying out those duties as a defense to judicial misconduct is tantamount to an admission by an accused judge that he does not possess the qualifications necessary to hold the office to which he has been elected." ***Willard***, 788 So. 2d at 746.

Respondent's conduct during the November 1, 2013 Show Cause hearing was intentional. He made emphatic statements of denial at the Show Cause hearing. Respondent did not answer during his examination with responses such as "I do not know" or "I am not sure," but he answered with explicit denials such as "I have never in my life signed a second page with a signature blank on it and that's all." (Ex 4, p. 37); "I would never put my signature on that order." (Ex 4, p. 76); "I did not sign this order. I would never have signed this order increasing a bid." (Ex 4, p. 47). His statements were deceptive and misleading and an attempt to thwart the Commission's ability to find the truth.

During the March 12, 2015 Formal Hearing, Respondent was again asked about the signatures on the subject orders and his testimony regarding the subject orders was quite different

than his testimony at the prior Show Cause hearing. While testifying at the Formal Hearing, knowing the results of the handwriting analysis, Respondent finally admitted, under oath, to signing the subject orders that he had previously denied signing.

As a trial judge, especially a chancellor, Respondent is charged with the dual role of finder of fact and finder of law. Respondent is charged with the duty to find witnesses and evidence credible or not credible. Respondent has lost his credibility by making false and misleading statements while under oath, and should not have the opportunity to pass judgment on those who appear before him in his courtroom.

(6) The presence or absence of mitigating or aggravating factors.

The Commission is not aware of any mitigating or aggravating factors not already mentioned herein. Respondent's conduct was in violation of the Canons of Judicial Conduct and the Mississippi Constitution.

CONCLUSION

It is deplorable when a judge, who has taken an oath to uphold the law, engages in such conduct as witnessed in this case. Respondent's actions have destroyed any positive perception the Newsome family may ever have of the judiciary and such behavior cannot be tolerated. An incapacitated ward is left with a home that is in dreadful condition costing her hundreds of dollars per month to maintain. Further, Respondent's credibility has forever been tarnished because he chose to be dishonest in his answers, while under oath, at the Show Cause hearing in this case. How can he ever be expected to encourage, or better yet insist, that truth be spoken in his courtroom? The high standards of conduct expected of our judiciary have been violated and discredited by Respondent.

Therefore, in light of the pertinent case law, the Commission proposes that this Court find, by clear and convincing evidence, that Respondent's conduct in this case violated Section 177A of the Mississippi Constitution of 1890, as amended, and that said conduct constitutes willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. The Commission recommends that Respondent be removed from office. It is the only sanction that will restore confidence in the judiciary of the 13th Chancery Court District. The Commission further recommends that Respondent be fined the sum of $2,500.00 and ordered to pay the costs of these proceedings in the sum of $5,882.67.

Respectfully submitted,
MISSISSIPPI COMMISSION ON
JUDICIAL PERFORMANCE
/s/ Darlene D. Ballard

_____
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CERTIFICATE OF SERVICE

In compliance with Rule 25(d) of the Mississippi Rules of Appellate Procedure, I, Darlene D. Ballard, Executive Director for the Mississippi Commission on Judicial Performance, do hereby certify that I have this date electronically filed the foregoing Brief on behalf of the Mississippi Commission on Judicial Performance, with the Clerk of the Supreme Court of Mississippi using the MEC system which sent notification to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Judge Lee J. Howard
Commission Chairman
660 North Street, Suite 104
Jackson, MS 39202

This the 30th day of July 2015.

/s/ Darlene D. Ballard

Darlene D. Ballard